UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM M. ROACH, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DC-1221-97-0251-W-1 DATE: JUN 11 1999

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John J. Martens, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Vice Chair Slavet issues a concurring opinion.

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued August 15, 1997, that dismissed his individual right of action (IRA) appeal for lack of jurisdiction and as moot. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the initial decision, and REMANDS the appeal for further adjudication.

BACKGROUND

¶2 The appellant filed a complaint with the Office of Special Counsel (OSC) alleging that the agency significantly changed the duties of his position, issued

him a letter of warning, suspended his security clearance, detailed and reassigned him, and garnished his wages, in retaliation for telling his supervisors that an action they planned to take violated the "Anti-Deficiency Act." After OSC terminated its investigation into the appellant's whistleblowing complaint, the appellant filed an IRA appeal with the Board's Washington Regional Office. After filing the appeal, the appellant also alleged that the agency had "constructively discharged" him in retaliation for his whistleblowing.

¶3 Following various submissions by both parties, and a teleconference, the administrative judge issued an order stating that it appeared that the appeal should be dismissed because there were no "justiciable matters" to adjudicate. The administrative judge stated that the Board lacked jurisdiction over the security clearance suspension and garnishment claims because neither was a personnel action under 5 U.S.C. § 2302(a), and that while the agency detailed the appellant for a period of time, it never effected a reassignment. The administrative judge further noted that the appellant was no longer an agency employee, so the Board could not effect any meaningful corrective action should the appellant prevail on the detail or the alleged diminution of duties issues, assuming these matters constituted personnel actions within the Board's jurisdiction. The administrative judge also questioned whether the appellant's "constructive discharge" claim was an appealable personnel action, or if he had raised it with OSC in connection with his whistleblowing claim. The administrative judge, therefore, ordered the appellant to show cause why the appeal should not be dismissed. Appeal File, Tab 7.

¶4 Upon considering the appellant's response to the show-cause order, the administrative judge dismissed the appeal, finding the following facts: (1) The appellant, a former Financial Analyst, made an alleged protected disclosure in July of 1994; (2) in August of 1994, the agency changed its office procedure by relieving the appellant of responsibility for signing cash collection vouchers;

(3) on January 10, 1995, the agency issued him a letter of warning for his unauthorized signing of a cash collection voucher; (4) on January 22, 1995, the agency detailed the appellant to a different section; (5) on January 30, 1995, the agency informed the appellant that it was suspending his access to classified information pending a final security clearance determination; (6) although the agency informed him on September 26, 1995, that it intended to realign his position and reassign him with it, the agency did not effect the proposed reassignment; (7) on December 17, 1995, the agency processed the appellant's termination based upon his appointment to a position with the Department of Defense; and (8) the agency denied the appellant's request for a waiver of recovery of an erroneous award he had received, and garnished his salary to recover this money.

¶5 The administrative judge then found that, although the appellant pursued with OSC his complaint about a change in duties, the letter of warning, the suspension of his security clearance, his detail and reassignment, and the wage garnishment, neither the security clearance suspension nor the garnishment of wages is a "personnel action" within the Board's jurisdiction under 5 U.S.C. § 2302(a)(2)(A). The administrative judge also found that the Board could not effect meaningful corrective action with respect to the other matters because the letter of warning was not a formal action included in the appellant's official personnel folder (OPF), and that the diminution of duties, the detail, and the reassignment could not be remedied because the appellant was no longer an agency employee. The administrative judge further found that the appellant's claim that he had been "constructively discharged" did not constitute a personnel action for purposes of an IRA appeal because the agency did not remove or separate him, and instead, it terminated him because he had left the agency to take a new position in a different agency. The administrative judge, therefore, dismissed the appeal as moot.

¶6 In his petition for review, the appellant contends that the administrative judge erred in dismissing his appeal without affording him a hearing, and reiterates his claim that the agency constructively removed him by harassing him in retaliation for his protected disclosures. The appellant further asserts that, contrary to the administrative judge's findings, the agency placed a formal letter of warning in his OPF, although it later rescinded it, and that the garnishment of his wages was a personnel action. He also contends that the agency proposed to suspend him for 14 days in reprisal for his whistleblowing, thereby hindering his efforts to obtain new employment.

¶7 As more fully discussed below, the Board found that an aspect of this appeal raised a significant issue concerning Board jurisdiction in an IRA appeal. The Board, therefore, sought amicus briefs which we have considered in reaching our conclusions here.

ANALYSIS

Exhaustion of Remedies with OSC

¶8 The Whistleblower Protection Act of 1989 (WPA) prohibits government personnel actions taken against an employee in reprisal for whistleblowing. 5 U.S.C. § 2302(b)(8); *Mintzmyer v. Department of the Interior*, 84 F.3d 419, 422 (Fed. Cir. 1996). Except where an independent right to appeal an adverse personnel action directly to the Board exists, an employee or former employee aggrieved by a personnel action must first seek corrective action from OSC. *Id*. Only after OSC has notified the employee or former employee that it has terminated its investigation, or has failed to commit to pursuing corrective action within 120 days, may that person file an IRA appeal under 5 U.S.C. § 1221 with the Board. 5 U.S.C. § 1214(a)(3); *Mintzmyer*, 84 F.3d at 422.

¶9 To satisfy this IRA exhaustion requirement, an appellant must inform OSC of the precise ground of his charge of whistleblowing, so OSC has a sufficient basis to pursue an investigation which might lead to corrective action. Further, once

the OSC process has terminated and the appellant has filed his Board IRA appeal, the Board will consider only those matters that the appellant asserted before OSC, and it will not consider any subsequent recharacterization of those charges put forth by the appellant in his appeal to the Board. *See Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992); *D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 231 (1993), *modified in part by Thomas v. Department of the Treasury*, 77 M.S.P.R. 224 (1998).

¶10 The record in the present case establishes that the appellant has not satisfied this exhaustion requirement with respect to the proposed 14-day suspension. As mentioned above, the appellant sought corrective action from OSC with respect to an alleged significant change in duties, a letter of warning, the suspension of his security clearance, a detail and reassignment, and the garnishment of his wages. Appeal File, Tabs 1, 8. There is no evidence, however, that the appellant sought corrective action with respect to the alleged 14-day suspension. *Id*. Because the Board otherwise lacks jurisdiction over a suspension for 14 days or less, and he has not first pursued this matter with OSC, the Board lacks jurisdiction over this claim in this IRA appeal. *See Jones v. U.S. Postal Service*, 55 M.S.P.R. 491, 493 (1992).

¶11 Where, however, an agency takes an action against an employee that is otherwise appealable to the Board, an employee who believes the action was in retaliation for whistleblowing may choose either to seek corrective action from OSC before filing an IRA appeal with the Board, or to appeal directly to the Board. *See Brundin v. Smithsonian Institution*, 75 M.S.P.R. 332, 335 (1997). The appellant here alleged that he did not resign from employment with the agency, and that, instead, it had "constructively discharged" him by creating a hostile environment. Appeal File, Tab 8.

¶12 A separation pursuant to a voluntary resignation is not a personnel action under section 2302. *See Shelly v. Department of the Treasury*, 75 M.S.P.R. 411,

413-14 (1997). An involuntary resignation, however, is tantamount to a removal, which may be appealed to the Board, and is characterized by regulation as an otherwise appealable action. *See* 5 C.F.R. §§ 1201.3(a)(2), 1209.2(b)(2); *Brundin*, 75 M.S.P.R. at 334; *cf. Shelly*, 75 M.S.P.R. at 414 (because the appellant did not show that his resignation was involuntary, his separation cannot be appealed directly to the Board). Because the appellant's constructive discharge claim, if proven, constitutes an otherwise appealable action, a removal, he was not required to have exhausted his remedy with OSC, and the administrative judge, therefore, erred in dismissing this aspect of the appeal either because the appellant had not raised it with OSC or because it was not a personnel action. *See Lei v. Department of Veterans Affairs*, 71 M.S.P.R. 91, 95 (1996).

"Personnel Actions" under the 1994 Amendments to the WPA

¶13 The administrative judge also found that, although the appellant exhausted his OSC remedy regarding the garnishment of his wages and the security clearance suspension, the Board lacked jurisdiction over these matters because they are not "personnel actions" under 5 U.S.C. § 2302(a)(2)(A). We find, however, that the garnishment of the appellant's wages falls within the statutory definition of a "personnel action," but the suspension of his security clearance does not.

¶14 5 U.S.C. § 2302(a)(2)(A)(ix) provides that "personnel action" means a decision concerning pay, benefits, or awards. In the present case, the agency has garnished the appellant's pay to recover an award that it believed he received improperly. Appeal File, Tabs 1, 8; Initial Decision at 2. The garnishment was, therefore, an agency decision that concerned both pay and an award. As such, it satisfies the statutory definition of a "personnel action."

¶15 We also recognize that the definition of a "personnel action" under the WPA, as amended in 1994, and the legislative history for those amendments, raise the question of whether a denial, suspension, or revocation of a security clearance is

now included within the WPA's scope of protection for whistleblowers. When enacted in 1989, the WPA contained the following definition of "personnel action":

> (A) "personnel action" means --
> (i) an appointment;
> (ii) a promotion;
> (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
> (iv) a detail, transfer, or reassignment;
> (v) a reinstatement;
> (vi) a restoration;
> (vii) a reemployment;
> (viii) a performance evaluation under chapter 43 of this title;
> (ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and
> (x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level;
>
> with respect to an employee in, or applicant for, a covered position in an agency.

5 U.S.C. § 2302(a)(2) (1989).

¶16 Thus, the statute did not specifically refer to security clearances, and the Board has held that the revocation of a security clearance was not a "personnel action" under 5 U.S.C. § 2302(a)(2), and, therefore, could not be the subject of an IRA appeal. *See, e.g., McCabe v. Department of the Air Force*¸ 62 M.S.P.R. 641, 647-48 (1994), *aff'd,* 62 F.3d 1433 (Fed. Cir. 1995) (Table). In reaching this conclusion, the Board reasoned that the process for deciding whether to revoke a security clearance was analogous to a fitness-for-duty examination because both procedures determine whether an employee meets the qualifications for a position. *See Weber v. Department of the Army*, 59 M.S.P.R. 293, 297 (1993), *aff'd*, 26 F.3d 140 (Fed. Cir. 1994) (Table). Because the Board had found that a fitness-for-duty examination was not included within the statutory definition of a

personnel action, it concluded that a revocation of a security clearance must similarly be excluded. *Id.* The Board also found that the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), which held that the Board lacked authority to review an agency's underlying reasons for the suspension or cancellation of a security clearance in connection with an adverse action appeal, precluded the Board from reviewing allegations of retaliation for whistleblowing when the claims pertained to revocation of a security clearance, even though the WPA was designed to encourage disclosures of what employees reasonably believed to be government wrongdoing. *See Wilson v. Department of Energy*, 63 M.S.P.R. 228, 232 (1994).

¶17 In 1994, however, Congress amended the WPA in several respects, including the definition of a "personnel action" in section 2302(a)(2). Action leading to this change began on March 19, 1993, when Senator Levin introduced S. 622, a bill to authorize appropriations for the OSC and the Board. This bill contained several proposed changes to 5 U.S.C. § 2302(a)(2)(A), including adding psychiatric testing or examination to the list of enumerated personnel actions. S. 622, 103d Cong., 1st Sess. (1993); 139 Cong. Rec. S3276 (daily ed. Mar. 19, 1993).

¶18 On August 6, 1993, Representative McCloskey introduced a similar bill in the House of Representatives to reauthorize OSC. H.R. 2970, as amended on August 9, 1994, also proposed additions to the personnel actions enumerated in section 2302(a)(2). It similarly included psychiatric testing or examination, and also included a denial, revocation, or other decision relating to a security clearance. H.R. 2970, 103d Cong., 1st Sess. (1993).

¶19 On August 23, 1994, the Senate Committee on Governmental Affairs issued its report accompanying a different version of S. 622. This bill still included a decision to order psychiatric testing or examination as a personnel action, but now also included an amendment to 5 U.S.C. § 2302(b)(8). S. Rep. No. 358 at 9, 19 (1994). That section had prohibited any employee from taking, or failing to take,

a “personnel action” with respect to any employee or applicant for employment as a reprisal for disclosing information that the employee or applicant reasonably believed evidenced a violation of law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8) (1988). Section 5(d) of S. 622, however, proposed to amend section 2302(b)(8) by inserting "or otherwise discriminate or retaliate against" after the words "a personnel action."

¶20 The Committee explained that this addition addressed the WPA's narrow construction regarding the types of retaliatory action for which remedies were available. It noted that many retaliatory actions fell outside the statute’s enumerated definitions of personnel actions, and cited an agency's relieving an employee of high-profile assignments, and a loss of a security clearance as examples of retaliation that the WPA was enacted to remedy. The Committee stated that the WPA was intended to create a clear remedy for all cases of retaliation or discrimination against whistleblowers, and that such retaliation must be prohibited regardless of the form it may take. It stated that it intended this change to cover any discriminatory or retaliatory action taken against a whistleblower because of protected conduct. *Id*. at 9-10.

¶21 On September 30, 1994, the House Committee on Post Office and Civil Service submitted its report accompanying H.R. 2970, which specifically included the denial, revocation, or other determination relating to a security clearance as a personnel action. H. Rep. No. 769, 103d Cong., 2d Sess. at 37 (1994). The committee expressed its belief that the WPA had a “plethora” of coverage gaps that left many reprisal victims defenseless. It stated that the ten personnel actions listed in section 2302(a)(2)(A) reflected the outer boundaries for whistleblower protection, that the list had not kept pace with the “creativity of effective harassment tactics,” and that two of the “most glaring omissions” concerned mandatory psychiatric examinations and security clearance actions. The

Committee noted that security clearances were preconditions of employment for nearly three million federal and contract workers, that employers could "de facto terminate" an employee by removing the clearance, and that federal workers had no functional due process rights to defend their clearances, leaving them defenseless against "back door" retaliation when a forthright attempt at firing could not succeed. *Id*. at 14-15.

¶22 The Committee further stated that the bill was intended to legislatively convert Executive Branch security clearance decisions into personnel decisions that employees could allege constituted prohibited personnel practices. The Committee, however, also noted an exception to this rule, stating that a security clearance decision did not, in and of itself, constitute a decision to permit or allow access to sensitive information, and that it recognized that information access determinations were Executive Branch prerogatives. Thus, the Committee stated that the bill's amendment to the list of personnel actions did not cover decisions concerning an individual's access to Sensitive Compartmented Information (SCI), which consists of particularly sensitive classified material relating to intelligence sources, methods, or analytical processes, and that such decisions were not subject to review by the Board or the courts. The Committee also stated that it did not intend that jurisdiction be limited to the listed personnel actions, and that many forms of unlisted harassment constituted threats that chilled or defeated the exercise of merit system rights. It included retaliatory investigations, reorganizations, reductions in force, and defunding of positions as examples of unlisted personnel actions. *Id*. at 15.

¶23 On October 3, 1994, the Senate agreed to an amendment to S. 622 that eliminated section 5(d), which would have amended section 2302(b)(8), and replaced it with, among other things, the addition to subsection (a)(2) of "any other significant change in duties, responsibilities, or working conditions." 140 Cong. Rec. S13,960 (daily ed. Oct. 3, 1994). That same day, the House passed its

version of H.R. 2970, that included as a personnel action a denial, revocation, or other determination relating to a security clearance. Representative McCloskey explained that the bill expanded the definition of personnel actions to include several practices that were not yet covered, but that could have a debilitating effect on an employee's career. He said that the expanded definition of personnel action attempted to "level the playing field" for employees in these difficult cases. 140 Cong. Rec. H10,617 (daily ed. Oct. 3, 1994).

¶24 On October 7, 1994, the Senate considered and passed an amendment to H.R. 2970. This version of the bill included two new enumerated personnel actions under 5 U.S.C. § 2302(a)(2)(A). Subsection (x) included a decision to order psychiatric testing or examination, and a new subsection (xi) included "any other significant change in duties, responsibilities, or working conditions." 140 Cong. Rec. S14,668-70, 14,884-85 (daily ed. Oct. 7, 1994). The House also considered and agreed with the Senate's amendment, which did not specifically list a denial or revocation of a security clearance as a personnel action, but did include “any other significant change in duties, responsibilities, or working conditions." 140 Cong. Rec. H11,419 (daily ed. Oct. 7, 1994). In asking for unanimous consent for the legislation, Representative McCloskey stated that he was particularly concerned with providing protections against abusive practices, such as ordering psychiatric examinations arbitrarily, and arbitrarily suspending or terminating security clearances, and that nothing in the Senate amendment affected these aspects of the early versions of the House bill. Representative McCloskey added that, consistent with the WPA's remedial purpose, the addition of "any other significant change in duties, responsibilities or working conditions" to the listed personnel actions should be interpreted broadly, and that “personnel action” is intended to include any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system. He said that examples include, among others, the denial, revocation, or suspension of a

security clearance. *Id*. at H11,421. The President signed H.R. 2970 into law on October 29, 1994.

¶25 Thus, 5 U.S.C. § 2302(a)(2)(A)(xi) now provides that a significant change in duties, responsibilities, or working conditions constitutes a "personnel action." Because this definition and its legislative history could support the conclusion that the suspension, revocation, or denial of a security clearance is a personnel action under the WPA that could be pursued with the Board in an IRA appeal, the Board invited interested parties to file amicus briefs in this appeal, and the related case of *Hesse v. Department of State*, MSPB Docket No. DC-0752-97-1079-I-1, on the issues of whether the Board has authority to adjudicate whistleblower retaliation claims involving an appellant's security clearance, and, if so, whether there are limits pertaining to the scope of that authority.

¶26 In the Federal Register notice soliciting these briefs, the Board further stated that a conclusion that an agency decision pertaining to a security clearance is a "personnel action," that may be pursued with the Board under the WPA, raised subsidiary issues that included the following: (1) May appellants raise claims of whistleblower retaliation involving security clearance determinations as affirmative defenses in Chapter 75 adverse action appeals, in addition to IRA appeals under the WPA, or are such Chapter 75 defenses still precluded by *Egan*; (2) if such whistleblowing claims may be raised in both Chapter 75 and IRA appeals, should the Board continue to apply its current burden of proof and analytical framework, given the Supreme Court's concern for this issue in *Egan*; (3) what is the relationship between a security clearance determination and a decision to permit or allow access to sensitive information, such as Sensitive Compartmented Information (SCI); (4) are there limits to the Board's authority over the claims and evidence pertaining to security clearances or sensitive information; and (5) how should the Board adjudicate claims of evidentiary privilege that may arise in security clearance cases, and what effect, if any, will

such privilege have on a party's burden of proof? 63 Fed. Reg. 55,648 (Oct. 16, 1998).

The amicus submissions

¶27 The Department of Defense (DOD), the Office of Personnel Management (OPM), the Department of Justice (DOJ), OSC,[1] the Central Intelligence Agency (CIA), and appellant Hesse filed amicus briefs, and, in some cases replies and supplements to the amicus briefs, discussing these issues. DOD, OPM, DOJ, and the CIA all argue that the Board still lacks jurisdiction over security clearance determinations under the WPA, while OSC and appellant Hesse argue that the 1994 WPA amendments afford the Board this authority.

¶28 DOD, OPM, and DOJ first argue that the plain language of the WPA's 1994 amendments does not express a specific or clear intention to subject security clearance determination to Board review. They state that the Supreme Court held in *Egan* that, because Executive Branch security clearance decisions are "sensitive and inherently discretionary judgment call[s], committed by law to the appropriate agency of the Executive Branch," laws should not be interpreted to intrude upon the Executive's authority to control access to classified information "unless Congress has specifically provided otherwise," and they contend that such specific authorization remains lacking. They assert that the minor change in language, from "any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level," to "any other significant change in duties, responsibilities, or working conditions," does not constitute firm evidence that Congress intended a radical change in current law that would authorize Board review of security clearance decisions.

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[1] OSC also requested oral arguments before the Board. We find such arguments unnecessary, and, therefore, deny this request.

¶29 DOD further argues that the 1994 amendment's inclusion of a decision to order psychiatric testing or examination in the definition of "personnel action" showed that Congress knew how to specifically include a new set of practices if it so intended, so the absence of specific language concerning security clearance decisions shows that such practices are not personnel actions. OPM and DOJ also argue that courts have similarly declined to review security clearance decisions in the context of other statutes, such as the Rehabilitation Act and Civil Rights Act of 1964, absent a specific affirmative grant of jurisdiction, which overcomes the traditionally unreviewable discretion accorded the Executive in matters of national security, and this affirmative grant is lacking in the 1994 amendments. DOJ further asserts that courts have interpreted *Egan*, and its requirement that a statute contain the "unmistakable expression of purpose" needed for review of security clearance decisions, to bar both a challenge to the actual decision whether to grant or revoke a security clearance, and jurisdiction over separate issues that are based upon security clearance determinations.

¶30 OPM and DOJ further assert that the plain meaning of section 2302's new language does not include security clearances because such a determination is not a change in "duties, responsibilities or working conditions," and is instead an underlying requirement for a position, similar to an eligibility requirement, such as a certification or license. Thus, they argue that, while the revocation of a security clearance may lead to a change in duties, responsibilities, or working conditions, the revocation itself is not such a change.

¶31 In addition, these three amici argue that the legislative history of the 1994 amendments reveals that Congress did not intend to include security clearance determinations within the category of appealable personnel actions. They explain that, while the House version of this legislation contained specific language that would have explicitly authorized Board review of security clearance determinations, the Senate deleted this language, and it was never enacted. They

further contend that Representative McCloskey's comments that the legislation should be broadly interpreted to include a denial, revocation, or suspension of a security clearance should be given little weight because he made these remarks after the explicit language concerning security clearances had been stripped from the House bill and replaced with the general language that was, in fact, enacted. DOD also points out that the absence of discussion of *Egan* in the legislative history, and *Egan's* concerns with separation of powers and conflicting burdens of proof, further indicates that Congress did not intend to change existing law in passing the WPA amendments.

¶32 DOD further argues that finding jurisdiction over reprisal allegations concerning security clearance decisions raises the same constitutional and adjudicatory concerns the Court relied upon in *Egan* to find jurisdiction over such claims lacking in Chapter 75 adverse action appeals. It asserts that interpreting the WPA to permit Board and judicial review of security classification decisions would violate the constitutional principle of separation of powers because the authority to classify and control access to classified information, and to determine whether an individual is sufficiently trustworthy to access such information, arises from the constitutional investment of power in the President, and exists apart from any explicit congressional grant. It contends that allowing "non-experts," such as the Board and its reviewing courts, to review security clearance determinations would adversely impact the security clearance process because the Board and the courts do not have an extensive understanding of classified information, and the Executive Branch individuals who properly make these determinations may become overly cautious in deciding whether to revoke or deny a clearance due to their concern over later Board or judicial scrutiny.

¶33 DOD also asserts that this result will have a significant negative effect upon national security because, while certain intelligence agencies are exempt from WPA, the WPA covers much of DOD and other agencies with highly sensitive

national security responsibilities. It further argues that, while alternative procedures exist for removing employees under 5 U.S.C. § 7532, based upon national security concerns, and such decisions are not reviewable, these procedures are no substitute for current agency procedures for revoking security clearances. Finally, it recognizes that courts currently review some aspects of security clearance determinations, but argues that the scope of this review is limited and rare. OPM similarly notes that it is unlikely that Congress intended such vast changes in the security clearance law, that would also include review by OSC and a broader spectrum of appealable actions under the WPA, absent explicit expression of such intent.

¶34 DOD also argues that the Board should not reach the remaining subsidiary issues presented in the Federal Register notice because they only arise if the Board determines that it may review security clearance determinations in whistleblowing cases, and that it believes the Board may not conduct such an inquiry. It further asserts that, in any event, the evidentiary standards for security clearance determinations cannot be reconciled with the burden of proof frameworks in both IRA and Chapter 75 appeals. It argues that requiring an agency to show by clear and convincing evidence that it would have made the security clearance determination in the absence of whistleblowing conflicts with the "clearly consistent with national security" standard for granting a security clearance. Thus, it argues that the Board's standard would prevent the government from erring on the side of protecting national security, and would impinge upon an agency's discretion to make the predictive judgments regarding whether someone should be trusted with classified information.

¶35 OPM and DOJ echo this concern, and OPM explains that the "clear and convincing evidence" standard is stricter than the preponderant evidence standard, which concerned the Court in *Egan*, while DOJ notes that the Board could not change the standard of review to accommodate security clearance concerns

because the standard is statutory. DOJ also asserts that no viable remedy exists following a finding of whistleblower retaliation because it would be "wholly inappropriate" for the Board or OSC to grant a security clearance. Thus, because there is no workable or appropriate standard of review or available remedy, DOJ asserts that there remains no basis for the Board to review such decisions.

¶36 With respect to some of the remaining subsidiary questions, DOD states that, on "rare occasions," a security clearance revocation may be based on classified information, and that the agency should have the opportunity to present classified information in camera and ex parte because it was "extremely unlikely" that the evidence could be made available to the employee or his counsel. DOJ argues that the Board should decline to review security clearance determinations in Chapter 75 appeals, even if it finds that it has such jurisdiction over these matters in IRA appeals.

¶37 The CIA filed a brief that generally agreed with DOD, OPM, and DOJ, but specifically focused on the subsidiary question of the Board's jurisdiction to hear appeals involving SCI. It argues that the Director of Central Intelligence (DCI) has plenary authority regarding SCI under the National Security Act of 1947 and various Executive Orders. It further argues that SCI requires a separate security adjudication under guidelines set by the DCI, and that, because no SCI access revocation appears to have occurred in the *Roach* or *Hesse* cases, addressing this issue now would constitute an improper advisory opinion. In any event, it argues that OSC's position, that would afford the Board jurisdiction to review SCI determinations, is contrary to 5 U.S.C. §§ 2305 and 2302(a)(2)(C)(ii), which constitute clear congressional intent that the WPA was not intended to apply to the intelligence community or to interfere with the DCI's authorities, including the authority to protect intelligence sources and methods.

¶38 Taking the opposing position, however, OSC argues that the WPA amendments now include security clearance determinations within the definition

of “personnel actions.” It first argues that, under the statute's plain language, the denial or revocation of a security clearance is a "personnel action." It asserts that, as now amended, section 2302(a)(2)(A)(xi) provides that “personnel action” means “any other significant change in duties, responsibilities, or working conditions,” and that the phrase “any other” clearly signifies congressional intent to cover the widest possible range of agency actions that have an effect on an employee’s job duties or responsibilities. It further asserts that nothing in section 2302(a)(2)(A) places any limitations on the phrase, such as a restriction on the basis of the underlying reason for the change in duties, responsibilities or working conditions, and the Board has repeatedly recognized that this statutory provision should be broadly construed. It asserts that when an agency revokes an employee's security clearance, it changes that employee’s duties, responsibilities, or working conditions because the employee cannot be permitted access to classified information or secured facilities without that clearance, and that, unless the employee did not, in fact, need the clearance, the employee’s duties and responsibilities would have to change. Moreover, it argues that the enactment of the broad inclusive category in 2302(a)(2)(A)(xi) satisfies *Egan's* mandate for specific congressional intent to allow review of these decisions that intrude upon the Executive's usual authority.

¶39 OSC further asserts that the legislative history of the 1994 amendments to the WPA confirms that Congress intended to include the revocation of a security clearance within the broad definition of “personnel action.” It argues that Congress enacted the amendments to close “loopholes” in the WPA’s protections, and sought to broadly expand the types of covered agency actions to meet this goal. It explains that the Committee Reports on both the Senate and House versions of the amendments explicitly expressed an intention to include the retaliatory revocation or denial of a security clearance as a prohibited personnel practice, and that Representative McCloskey, one of the chief sponsors of the

amendments, explicitly identified the revocation of a security clearance as one of the newly covered personnel actions. It argues that both the House and Senate versions of the bill sought to include security clearance determinations, with the House using specific language and the Senate using broad language, and that the ultimate passage of the Senate version included its original broad language, that was intended to cover security clearances.

¶40 OSC further explains that, in addition to the statute's plain language, and legislative history, the congressional purpose behind the amendment further supports the conclusion that security clearance determinations are "personnel actions" under the WPA. It states that Congress intended to ensure that virtually all potential forms of reprisal against whistleblowers would be actionable, and that withholding protection for whistleblowers with respect to security clearance determinations would frustrate this congressional intent.

¶41 While OSC asserts that security clearance determinations are personnel actions under the WPA that may be raised in an IRA appeal, it nonetheless believes that the Court's decision in *Egan* still precludes raising such matters directly, or as an affirmative defense, in the context of a Chapter 75 appeal. It argues that *Egan* is based on the congressional grant of authority in Chapter 75, and that the WPA amendments did not amend the Chapter 75 statutory framework.

¶42 OSC further asserts that the Board must apply the statutory IRA burden of proof in analyzing a security clearance whistleblowing issue in an IRA appeal. It argues, however, that this burden of proof does not conflict with the Court's concern in *Egan*, that security clearances be granted only where it is clearly consistent with the interests of national security. OSC argues that, when assessing the agency's rebuttal in a whistleblowing appeal, the Board considers the strength of the agency's evidence in support of the personnel action, the existence and intensity of any motive to retaliate, and the agency's treatment of similarly situated employees. It argues that in applying this test, the Board has

the opportunity to be sensitive to the Court's concern in *Egan*, and could consider that agencies have broad discretion regarding security clearances in deciding whether an agency has articulated a reasonable basis for its security clearance determination.

¶43 OSC further believes that allowing review of security clearance determinations under Chapters 12 and 23 will not adversely affect national security, as the other amici contend. It argues that the Board's limited review in deciding whether a security clearance revocation was in retaliation for an exercise of protected rights would not disrupt the proper balance between the government branches by preventing the Executive from accomplishing its constitutionally assigned functions, and notes that courts routinely review security clearance determinations where a party alleges a "colorable" constitution claim, and in the course of deciding Freedom of Information Act requests. OSC argues that the Board can strike the proper balance between the President's authority and Congress's concerns in enacting the WPA.

¶44 It also claims that ruling that security clearance determinations are personnel actions under the WPA would subject only a small number of security clearance decisions to limited review in the few cases of whistleblowers who could present a colorable reprisal claim. It argues that, in contrast to *Egan*, the Board will not be reviewing the merits of an agency's judgment that an employee presents a security risk, or intrude into the President's authority to set eligibility standards for access to classified information. Instead, the Board would review whether the agency treated the employee in a discriminatory fashion because of protected activity. Where an appellant presents a prima facie case of reprisal, OSC argues that the agency would not have to prove that the appellant was a security risk by any standard of evidence, and would only have to show by clear and convincing evidence that it would have taken that same personnel action absent the disclosure. Thus, it asserts that the Board will not be "second guessing" the

agency's determination on whether an employee is a security risk, and will only be exercising its familiar function of determining whether the employee was subject to disparate treatment because of protected activity. It further notes that while this may require the Board to indirectly look at the substance of the security clearance determination, the clear and convincing evidence standard does not preclude it from deferring to "expert judgments" made by agency security personnel.

¶45 It further explains that the Executive Branch can foreclose external review of its security clearance decisions, in any event, by proceeding against employees under 5 U.S.C. § 7532, and points out that several agencies with the most sensitive national security responsibilities, such as the Federal Bureau of Investigation, the CIA, the Defense Intelligence Agency, the Central Imagery Office, and the National Security Agency are all exempt from the WPA. *See* 5 U.S.C. § 2302(a)(2)(c).

¶46 Finally, OSC ultimately agrees with the CIA, that the denial of access to SCI implicates issues beyond those otherwise before the Board, and that these issues warrant more extensive briefing. It, therefore, argues that the Board should not address this question in these cases. OSC also believes that review of classified information would be necessary in only few cases, and that the relevant inquiry would generally be the reasons the agency revoked the clearance, regardless of the content of the classified information.

¶47 Appellant Hesse has also filed several pro se briefs which essentially agree with OSC's position and its interpretation of congressional intent in enacting the WPA amendments. He also argues that whistleblowing claims regarding security clearance determinations are properly before the Board as an affirmative defense in a Chapter 75 appeal.

Security clearance determinations are not "personnel actions" under the WPA, as amended

¶48 Upon considering all of the above submissions, and the relevant case law, statutory provisions and legislative history, we find that the denial, revocation, or suspension of a security clearance is not a personnel action under the 1994 amendments to the WPA, and the Board, therefore, continues to lack jurisdiction over such claims in an IRA appeal or as a whistleblowing retaliation affirmative defense claim in a Chapter 75 appeal.

¶49 At the outset, we reject OPM and DOJ's argument that the denial, revocation, or suspension of a security clearance is not a significant change in duties, responsibilities, or working conditions, and is, therefore, beyond the scope of the WPA amendments. As OSC correctly argues, the Board has held that it will construe the WPA broadly, and we find that adverse security clearance determinations are tantamount to a change in duties, responsibilities, or working conditions. *See Perez v. Federal Bureau of Investigation*, 71 F.3d 513, 514 (5th Cir. 1995); *Singleton v. Ohio National Guard*, 77 M.S.P.R. 583, 587 (1998). Thus, adverse security clearance determinations are not excluded from the statute's meaning on the theory that they are akin to a license or a condition of employment, rather than an actual change in duties, responsibilities or working conditions, as some of the amici argued. We must, therefore, examine whether Congress's inclusion of "any other significant change in duties, responsibilities or working conditions" as a personnel action otherwise authorizes the Board to review security clearance determinations.

¶50 In *Egan*, the Supreme Court examined whether the Board had authority to review security clearance determinations in the context of an adverse action appeal under 5 U.S.C. Chapter 75. It held that, unless Congress specifically provided otherwise, the Board lacked authority to review adverse security clearance determinations, and the agency head who had been delegated authority over such decisions by the President had the discretion to protect the classified information for which he was responsible. The Court found that Chapter 75 did

not specifically grant the Board such authority, that Congress's failure to specifically exclude security clearance matters from the Board's jurisdiction did not mean that those determinations fell under the Board's scope of review, and that review authority over security clearance determinations must be specifically included in the statute because of national security concerns. In finding that this statute did not confer such authority to the Board, however, the Court also indicated that Congress had the constitutional authority to delegate review over these traditionally Executive Branch decisions, but that because of concerns with separation of powers and national security, Congress was required to grant such authority specifically. *Egan*, at 527-530.

¶51 We recognize that *Egan* interpreted a different statutory provision than the one before us. In finding the above, it was deciding the limited question of whether the Board had jurisdiction over security clearance determinations in connection with adverse actions taken pursuant to 5 U.S.C. Chapter 75. *Egan*, at 520. The issue before us, however, concerns the breadth of the 1994 amendments to the WPA, that Congress enacted after *Egan*. Thus, the question is whether Congress has now given the Board authority to review security clearance determinations in connection with whistleblowing claims.

¶52 Although *Egan* does not directly resolve this question, it provides the standard for reviewing legislation to determine whether Congress has empowered the Board to review these typically Executive Branch determinations, and other courts have applied this standard to determine whether Congress provided authority to review security clearance determinations raised in connection with other legislation, such as the Rehabilitation Act of 1973, and Title VII of the Civil Rights Act of 1964. These courts have found such authority lacking where the statutes did not contain a specific, unmistakable expression of intent to allow review of security clearance decisions. *See Brazil v. Department of the Navy*, 66

F.3d 193, 196-97 (9th Cir. 1995); *Guillot v. Garrett*, 970 F.2d 1320, 1323-26 (4th Cir. 1992). *See also Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990).

¶53 Applying the Court's standard to the WPA's 1994 amendments yields the conclusion that Congress has not authorized the Board to review security clearance determinations as personnel actions in whistleblowing appeals. The inclusion of the broad category of "any other significant change in duties, responsibilities, or working conditions" does not show the unmistakable expression of intent to allow review of security clearance determinations that the Court mandated in *Egan*. *Egan* 484 U.S. at 530; *Brazil*, 66 F.3d at 197. In this regard, we disagree with OSC's argument that Congress has satisfied the *Egan* specificity requirement by providing for a broad all-inclusive category that necessarily includes security clearance determinations because it does not exclude them. In *Brazil*, the Ninth Circuit rejected the similar argument, pertaining to section 717(a) of Title VII. There, the employee argued that a security clearance determination could be reviewed in connection with this statute, which provided that "all personnel actions" affecting employees be made absent from discrimination. The court found, however, that the broad phrase "all personnel actions" did not evidence the unmistakable expression of purpose necessary to conclude that Congress intended judicial review of security clearance determinations in Title VII claims. 66 F.3d at 197; *see also Guillot*, 970 F.2d at 1325.

¶54 We also recognize, however, that, in analyzing these other statutes, the courts noted the absence of intent to allow review of security clearance determinations in the statutes' legislative histories. *See Egan*, at 530-31, 531 n.6; *Brazil*, 66 F.3d at 197; *Guillot*, 970 F.2d at 1325. As mentioned above, however, portions of the legislative history of the WPA's amendments reveal some congressional intent to protect whistleblowers from retaliatory adverse security clearance determinations. We find, however, that to the extent Congress may have expressed such concerns

while debating the amendments, it failed to effectuate that intent because it ultimately enacted language that lacked the specificity mandated by the Court in *Egan*. Finally, in light of our conclusion that Congress did not provide the Board with authority over security clearance decisions in whistleblower appeals, we need not address the remaining issues contained in our Federal Register notice, including questions concerning the analytical framework and burden of proof in these cases. Our decision here also, of course, means that the Board continues to lack jurisdiction over security clearance issues in Chapter 75 appeals as well.

Mootness

¶55 The administrative judge also found that, even if the agency changed the appellant's duties, issued him a letter of warning, and detailed and reassigned him to another position in retaliation for a protected disclosure, and the appellant otherwise met the criteria for filing an IRA appeal, these matters were moot because the Board could not effect meaningful corrective relief. Initial Decision at 3-4. The administrative judge found that the letter of warning was not a formal disciplinary action and was not a matter of record in his OPF, and that because the appellant was no longer employed by the agency, no meaningful relief could be granted regarding the alleged diminution of duties, detail, or reassignment. *Id.* at 3-4. We need not decide, however, whether these issues are moot for these reasons because the administrative judge erred in dismissing them as moot without first affording the appellant notice of his right to seek consequential damages under the WPA.

¶56 In addition to changing the definition of "personnel action" discussed above, the 1994 amendments to the WPA broadened the Board's remedial authority in whistleblowing cases. As revised by those amendments, 5 U.S.C. § 1221(g)(1)(A)(ii) authorizes the Board to award consequential damages as part of a corrective action award. *See Roman v. Department of the Army*, 72 M.S.P.R. 409, 412-13 (1966), *aff'd*, 129 F.3d 134 (Fed. Cir.) (1997), *cert. denied*, 118 S.

Ct. 1373 (1998). Although a request for consequential damages does not, by itself, preclude dismissing an IRA appeal as moot, an administrative judge should afford an appellant a specific opportunity to raise such a claim before dismissing an appeal on this basis. *See Hoever v. Department of the Navy*, 70 M.S.P.R. 386, 388-89 (1996); *cf. Hodge v. Department of Veterans Affairs*, 72 M.S.P.R. 470, 472-73 (1996) (an appeal should not be dismissed as moot where the appellant has raised a non-frivolous claim of discrimination and the administrative judge has not afforded the appellant a specific opportunity to raise a claim for compensatory damages).

¶57 In the present case, the administrative judge did not afford the appellant a specific opportunity to raise a consequential damages claim before dismissing the matters at issue as moot. Appeal File, Tabs 2, 7. We, therefore, conclude that the administrative judge erred in dismissing the appeal based upon the Board's inability to afford any meaningful relief.

ORDER

¶58 Accordingly, we REMAND this appeal to the Washington Regional Office for further adjudication on the appellant's claims that the agency constructively removed him, and that it garnished his wages, issued him a letter of warning, changed his duties, and detailed and reassigned him in retaliation for his whistleblowing activities.

FOR THE BOARD:

_____
Robert E. Taylor
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF VICE CHAIR BETH S. SLAVET

in

William Roach v. Department of the Army,
Docket No. DC-1221-97-0251-W-1

I agree with the majority opinion, and I write separately only because I do not agree with ¶ 49 of the majority opinion, which states that an "adverse security clearance determination[ ]" is "tantamount to a change in duties, responsibilities, or working conditions." While an adverse security clearance determination could lead to a change in duties or responsibilities, such a determination in and of itself is not an alteration of duties or responsibilities. Accordingly, I would hold that a security clearance determination does not fall within the definition of "personnel action" at 5 U.S.C. § 2302(a)(2)(A)(xi). I would further hold that, even if it is possible to interpret section 2302(a)(2)(A)(xi) as encompassing security clearance determinations, the statute should not be so interpreted because, as explained in ¶¶ 50-58 of the majority opinion, Congress did not give a sufficiently clear indication that it intended this provision to cover security clearance determinations.

JUN 11 1999
Date

Beth S. Slavet
Vice Chair